

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NICOLE FERGUSON,

Plaintiff,

vs.

EAST RIVER EXPEDITE, INC., d/b/a THE
UPS STORE,

Defendant.

Civ. 21-4086

**COMPLAINT AND REQUEST FOR
TRIAL BY JURY**

Plaintiff Nicole Ferguson brings this discrimination in employment action, stating the following claims against East River Expedite, Inc., d/b/a The UPS Store:

JURISDICTION

1. This action for discrimination on the basis of sex arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (“Title VII”).

2. Nicole Ferguson (“Ferguson”) is an adult resident of Lennox, South Dakota.

3. East River Expedite, Inc., doing business as The UPS Store, is a business services center that operates store # SF2125 at 2601 South Minnesota Avenue, Suite 105, Sioux Falls, SD, 57105 (“The UPS Store”).

4. At all relevant times, The UPS Store was an employer within the meaning of 42 U.S.C. § 2000e(b).

5. At all relevant times, Ferguson was an employee of The UPS Store within the meaning of 42 U.S.C. § 2000e(f).

6. Ferguson timely filed a Charge of Discrimination with the Equal Opportunities Commission on July 23, 2020, based on sex (pregnancy).

7. The Equal Opportunities Commission issued its Notice of Right to Sue on February 22, 2021.

8. As such, this Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated herein pursuant to 28 U.S.C. § 1331.

9. Venue is proper under 28 U.S.C. § 1391 because the events or omissions giving rise to the claims occurred within the Southern District of the District of South Dakota.

FACTUAL ALLEGATIONS

10. Ferguson was hired at The UPS Store in 2016.

11. After only a few months of employment, Ferguson was promoted to Store Manager.

12. In this position, she excelled and received positive feedback from her then-supervisor, Reva Johnson.

13. In February 2019, Dennis Cromwell (“Cromwell”) purchased The UPS Store.

14. A few months later, Cromwell conducted a performance review with Ferguson, giving her a “good review,” a raise in compensation, and recommended her for educational courses to advance her employment position.

15. Then, in or around May/June 2019, Ferguson announced to Cromwell and her coworkers that she was pregnant.

16. Cromwell thereafter began treating Ferguson much differently and adversely, including but not limited to asking Ferguson if she was still on her medication (referring to her pregnancy).

17. There was no formal maternity leave policy in place at The UPS Store.

18. In discussing maternity leave with Cromwell, Ferguson stated she anticipated taking eight to ten weeks of leave, which Cromwell approved.

19. On January 27, 2020, Ferguson gave birth to her son and began maternity leave.

20. Less than one month later, on February 21, 2020, Cromwell began contacting Ferguson and asking her when she was planning to return to work.

21. Ferguson responded that although she initially planned to take eight to ten weeks of maternity leave, she now desired to take twelve weeks.

22. Cromwell responded “Ok.” He did not tell her she could not take the additional leave, nor did he tell her it would be problematic for Ferguson to take additional leave.

23. Two days later, while Ferguson was still on maternity leave, Cromwell reached out to Ferguson again, asking if she would be willing to meet with him and other managers for a two-hour meeting to discuss “staffing/organizational issues and plan[s] for summer.”

24. A meeting occurred on Monday, March 9, 2020, per Cromwell’s request, at which point Cromwell informed Ferguson that he was “frustrated” and was “not pleased” about her taking additional maternity leave. At no point, however, did Cromwell inform Ferguson that she could not take the additional leave.

25. On March 30, 2020, Cromwell held a meeting with other employees, informing them that he was going to terminate Ferguson. In discussing Ferguson’s impending termination, he mentioned the fact that her termination related to her pregnancy, namely her desire to take twelve weeks of maternity leave.

26. The topic of the meeting then switched to the COVID-19 pandemic and how it may impact The UPS Store. One employee asked if there were stores closing. Cromwell stated that while some stores were closing, they (i.e., Defendant’s stores) were fortunate. In fact, despite the pandemic, in March 2020 Defendant’s stores did \$25,000 more in business than they had in March

2019. Cromwell followed-up with information by saying “nobody [was] in danger. [He will] keep people on.”

27. Yet, three days later, on April 2, 2020, Cromwell requested another meeting with Ferguson during which he stated he was “anticipating a huge drop-off in business” and “there is no way he can bring her back.” Accordingly, Cromwell told Ferguson that because of The UPS Store’s financial situation, he cannot keep people and he must terminate her.

28. In terminating her, Cromwell said, “it has nothing to do with your performance. It is nothing you did or didn’t do. I just can’t afford—I gotta get rid of people.” Later in the conversation, he followed up these sentiments by saying, “You have been and you are a valuable employee . . . but I gotta try to keep the business surviving.”

29. Notably, during the EEOC investigation process, Cromwell offered a number of verified factual statements, purporting said factual statements to be “true and correct to the best of [his] knowledge, and accurately reflect the position of [The UPS Store].”

30. However, there were multiple untruths contained in in his verified statements, including that Cromwell informed Ferguson she was being terminated because of her “performance, unilateral decision to take unauthorized leave . . . , and that the store would be over-staffed as a direct result of the COVID-19 pandemic.”

31. Moreover, although Cromwell informed Ferguson that she would not be the only employee terminated and that for the foreseeable future he has to “get rid of people,” on information and belief, Ferguson has been the only employee terminated.

32. That Cromwell was willing to lie, in a verified statement, to the EEOC regarding the circumstances under which Ferguson was terminated is evidence of pretext.

COUNT I
**Sex/Pregnancy Discrimination in Violation of
Title VII of the Civil Rights Act of 1964
and the Pregnancy Discrimination Act of 1978**

33. Plaintiff incorporates the foregoing paragraphs by reference.

34. United States Code chapter 42 section 2000e-2(a)(1) provides that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex[.]”

35. The Pregnancy Discrimination Act of 1978 made it clear that Title VII applies to discrimination based on pregnancy, stating employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k).

36. Ferguson was a member of a protected class.

37. Ferguson was qualified for her position as Store Manager and had been performing her duties adequately.

38. Ferguson was terminated on the basis of her sex, pregnancy, and related maternity leave, which constituted intentional discrimination against Ferguson by Defendant on the basis of her sex.

39. Ferguson was treated less favorably than similarly situated male employees and female employees who were not pregnant.

40. Defendant intentionally engaged in unlawful employment practices in violation of 42 U.S.C. § 2000e-2.

41. As a result of Defendant's conduct, Ferguson has suffered and will continue to suffer past and present loss of income, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation and other damages in an amount in excess of \$75,000.

42. Ferguson is entitled to attorneys' fees and costs incurred in connection with these claims.

43. Ferguson is entitled to punitive damages because the above-alleged acts were committed with malice, or reckless or deliberate disregard for Ferguson's rights and safety.

COUNT II
Sex Discrimination in Violation of
SDCL § 20-13-10 (State Law Claim)

44. Plaintiff incorporates the foregoing paragraphs by reference.

45. Pursuant to SDCL § 20-13-10, "It is unfair or discriminatory practice for any person, because of . . . sex . . . to discharge an employee, or to accord adverse or unequal treatment to any person, employee, or intern with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment."

46. Defendant treated Ferguson adversely and unequally in her employment because of her sex, specifically her pregnancy and related maternity leave.

47. Defendant intentionally engaged in unlawful employment practices in violation of SDCL § 20-13-10.

48. As a result of Defendant's conduct, Ferguson has suffered and will continue to suffer past and present loss of income, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation and other damages in an amount in excess of \$75,000.

49. Ferguson is entitled to attorneys' fees and costs incurred in connection with these claims.

50. Ferguson is entitled to punitive damages because the above-alleged acts were committed with malice, or reckless or deliberate disregard for Ferguson's rights and safety.

WHEREFORE, Plaintiff Nicole Ferguson prays for judgment against Defendant East River Expedite, Inc., d/b/a The UPS Store as follows:

A. For all relief available to Plaintiff, including compensatory relief and damages arising from loss of past and future income, benefits, emotional distress, and other damages, with interest on such amounts, and punitive damages in an amount in excess of \$75,000;

B. For Plaintiffs attorneys' fees, costs and disbursements incurred herein; and

C. For such other and further relief available.

Dated at Sioux Falls, South Dakota, this 10th day of May, 2021.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Ashley R. Brost

Reece M. Almond

Ashley R. Brost

206 West 14th Street, P.O. Box 1030

Sioux Falls, SD 57101-1030

Telephone (605) 336-2880

Facsimile (605) 335-3639

E-mail: ralmond@dehs.com

abrost@dehs.com

Attorneys for Plaintiff Nicole Ferguson

DEMAND FOR JURY TRIAL

Plaintiff hereby respectfully demands a trial by jury on all issues so triable.

/s/ Ashley R. Brost

Ashley R. Brost

JS 44 (Rev. 02/19)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Nicole Ferguson

(b) County of Residence of First Listed Plaintiff Lincoln County, SD, USA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Reece Almond and Ashley Brost, Davenport, Evans, Hurwitz & Smith
206 W 14th Street, Sioux Falls, SD 57104 605-336-2880

DEFENDANTS

East River Expedite, Inc. d/b/a The UPS Store

County of Residence of First Listed Defendant Lincoln County, SD, USA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Eric Steinhoff and Molly de la Vega, Lind, Jensen, Sullivan & Peterson
1300 AT&T Tower, 901 Marquette Ave S, Minneapolis, MN 55402

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. 2000e

Brief description of cause:
Employment discrimination on the basis of sex under Title VII

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

05/10/2021

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____